Supreme Court, U.S.
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No. 05-836

IN THE

Supreme Court of the United States

PHL, INC., an Illinois corporation, and
THE PRESIDENT LINCOLN HOTEL CORPORATION,
a Delaware corporation,

Petitioners,

v.

PULLMAN BANK AND TRUST COMPANY, Trustee under the Illinois Insured Mortgage Pilot Program dated July 14, 1982, and JUDY BAAR TOPINKA, Treasurer of the State of Illinois,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE ILLINOIS SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Constitution of the United States, through the Fourteenth Amendment, ensures that States will not deprive persons of due process of law. The State of Illinois, in its constitution, abrogated the doctrine of sovereign immunity as a constitutional prerogative, permitting its legislative branch to assert the doctrine by statute.

Putting aside the theoretical underpinnings of the notion of sovereign immunity—especially in the context of a republican government, in which the "sovereign" is the populace rather than the formal officers and governmental representatives—the courts in Illinois and elsewhere have crafted long-accepted exceptions to sovereign immunity to permit civil claims that, if successful, would lead to changes in governmental policy and conduct. Most typically, the courts craft an exception predicated on an "*ultra vires*" theory that stems from a syllogism—since the sovereign is presumed to be incapable of wrongful conduct, a suit claiming wrongful conduct by a person purporting to act on behalf of the sovereign must be deemed to be a suit that asserts that the governmental official, while acting in apparent pursuit of the government's interests, has, in fact, overstepped the bounds of power conveyed by the governmental office.

The "*ultra vires*" exception to sovereign immunity (designated in the opinion below as the "officer suit" exception to sovereign immunity) has been adopted throughout American jurisprudence to permit suits that seek relief other than damages from governmental officials. The inherent circularity of the exception has not been questioned, so that, although the courts' subject matter jurisdiction is determined, ultimately, by the courts'

resolution of the merits of the controversy, a litigant at least receives a fair opportunity to secure a judicial determination of rights in the face of a dispute with an arm of the government.

The trial court decided the case on its merits, finding the existence of a valid and enforceable contract and a wrongful refusal on the part of the Illinois Treasurer and her agent, the Trustee, to fulfill the terms of the agreement. The trial court further found that petitioners were entitled to the equitable remedy of specific performance.

But for the doctrine of sovereign immunity, this controversy would represent a garden-variety breach of contract. Because of the unique nature of the subject matter of the contract, and the absence of an adequate remedy at law, the equitable remedy of specific performance would also have been a straightforward application of settled state law—the facts elicited at the trial court level established that petitioners' purchase price for the subject commercial paper was in excess of the market value of the assets, such that an award of damages would not constitute a meaningful remedy.

However, because the parties to the contract and the resulting lawsuit included the Illinois Treasurer and the Trustee, acting on behalf and at the direction of the Treasurer, the doctrine of sovereign immunity was asserted to prevent the courts' consideration of the merits of the controversy. Both the trial court and the intermediate appellate court concluded that Illinois sovereign immunity principles did not preclude the courts' exercise of subject matter jurisdiction, but the Illinois Supreme Court, in a divided opinion, held that the courts lacked jurisdiction to resolve the dispute.

As a matter of Illinois law, the Illinois Court of Claims, established, among other things, to hear damage claims against the State and its agencies for breach of contract, does not have subject matter jurisdiction to resolve claims seeking equitable relief, such as claims for specific performance. However, because the Illinois Supreme Court chose here not to apply the longstanding "officer suit" exception to sovereign immunity in a case seeking equitable relief against the Treasurer and the Trustee, petitioners were left without any remedy for the breach of contract—there is no adjudicative body in the State that can entertain petitioners' claim for relief and no forum in which to seek vindication of their rights.

That denial of an available remedy does not stem from any principle of law reflected in the Constitution of either the United States or the State of Illinois, and the result represents a denial of due process of law. In fact, under the holding of the Illinois Supreme Court, there is no process of law available to petitioners to enforce rights arising under this commercial transaction.

This petition presents the question whether application of the state doctrine of sovereign immunity operated to deprive petitioners of due process of law.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner PHL, Inc., ("PHL") is an Illinois corporation with its principal place of business in Illinois. It has no parent company and no publicly held company owns 10 percent or more of PHL's stock. Petitioner The President Lincoln Hotel Corporation, ("President Lincoln") is a Delaware corporation with its principal place of business in Illinois. It has no parent company and no publicly held company owns 10 percent or more of President Lincoln's stock.

Respondent Pullman Bank and Trust Company ("Trustee"), Trustee under the Illinois Insured Mortgage Pilot Program dated July 14, 1982, is an Illinois bank with its principal place of business in Illinois. Respondent Judy Baar Topinka ("Treasurer") is the Treasurer of the State of Illinois and resides in Illinois.

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Petitioner respectfully petitions for a writ of certiorari to review the judgment of the Illinois Supreme Court in this case.

OPINIONS BELOW

The Illinois Appellate Court's Order affirming the trial court's entry of a decree of specific performance (Appendix ("Pet. App.") 44a-69a) is not published. That Order incorporated, as an Appendix, the court's previous decision rejecting the respondents' sovereign immunity defense, and that earlier decision can be found in the Appendix to this Petition (Pet. App. 70a-85a). The Illinois Supreme Court's opinion (Pet. App. 1a-43a) reversing the Illinois Appellate Court is published at 216 Ill.2d 250 (2005). The Illinois Supreme Court's September 26, 2005 order denying rehearing (Pet. App. 86a) is not otherwise published.

STATEMENT OF JURISDICTION

The Illinois Supreme Court entered its Opinion June 3, 2005 and denied petitioners' timely petition for rehearing on September 26, 2005. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides, in pertinent part, that, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law;. . . ."

STATEMENT OF THE CASE

This Petition asks this Court to review a decision of the Illinois Supreme Court denying petitioners' access to the courts to enforce rights arising under a commercial contract with the Illinois Treasurer and the Trustee of an insured mortgage program developed pursuant to Illinois law.

Petitioners PHL, Inc., ("PHL") and The President Lincoln Hotel Corporation ("President Lincoln") filed their Complaint for Enforcement of Agreements, Including a Mandatory Injunction and a Petition for Writ of Mandamus, December 29, 1995. The pleadings established that the State of Illinois adopted the Illinois Insured Mortgage Pilot Program in 1982 to assist businesses in coping with adverse economic conditions then existing in downstate Illinois, as the "cost and nonavailability of funds ha[d] depressed and discouraged the construction, development, and ownership of new structures and rehabilitation of existing structures intended to house industrial, commercial and similar activities within the State, including office buildings, hotels, retail and industrial facilities and other projects; ha[d] increased unemployment in the State; ha[d] reduced commercial and economic development of the State; and ha[d] adversely affected the State's tax base." In connection with the Illinois Insured Mortgage Pilot Program, the then-Trustee made a $13.4 million first mortgage loan in November 1982 to the Collinsville Hotel Venture and a separate $15.5 million first mortgage loan in December 1983 to the President Lincoln Hotel Venture.

From and after 1983, the State has been the 100% beneficial owner of the trust estate created pursuant to the Illinois Insured Mortgage Pilot Program, including both the

loan to the Collinsville Hotel Venture and the loan to the President Lincoln Hotel Venture. Thereafter, on various occasions, each mortgage loan was restructured. Ultimately, in February 1995, the Treasurer appointed respondent Pullman as successor trustee under the Illinois Insured Mortgage Pilot Program.

In June 1994, appraisals performed at the behest of then-Treasurer Patrick Quinn placed the combined value of the two mortgage loans at $7,785,000. In 1994, Treasurer Quinn retained a consultant to obtain bids to purchase both loans, and the range of the highest bids received was between $7.8 million and $8.05 million.

In early 1995, Treasurer Topinka proposed to sell the two loans to petitioners for $10 million. At the time, the Treasurer made public statements touting the proposed sale as being 20% higher than any other offer received for the loans, 30% higher than the June 1994 appraised value of the loans and 54% higher than the book value of those loans as carried on the Treasurer's books.

Petitioners alleged, and the Treasurer admitted, that the sale of the loans presented advantages to the State. The Treasurer acknowledged that her investments in the Illinois Insured Mortgage Pilot Program secured by the mortgage loans on the hotel properties had lost value and could continue to lose value; the administrative costs for the Illinois Insured Mortgage Pilot Program could be reduced if the loans were sold; the cash realized from the sale of the loans could be reinvested to earn a return; and, if the loans had been foreclosed, there would have been enforcement costs.